UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

STATE OF MAINE, *et al.*, Plaintiffs, v. ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*, Defendants.	Civil Action No. 1:14-cv-264-JDL

REPLY MEMORANDUM IN SUPPORT
OF EPA'S MOTION FOR A VOLUNTARY REMAND

INTRODUCTION

EPA has moved for a voluntary remand because it has decided to reconsider and change the decisions challenged in this case. Maine supports EPA's motion for voluntary remand, but it argues that the challenged decisions should also be vacated. In the alternative, Maine argues that the Court should impose a four-month time-limit on remand. The Houlton Band of Maliseet Indians (the "Band") and the Penobscot Indian Nation (the "Nation") argue that the Court should deny EPA's motion for voluntary remand, and also argue, in the alternative, that the Court should not vacate the challenged decisions if it grants EPA's motion.

As is shown below, the Court should grant EPA's motion for voluntary remand and it should not vacate the challenged decisions. The Court should retain jurisdiction during remand and stay the proceedings for nine months so that EPA can complete its administrative proceedings and make final decisions on remand.

ARGUMENT

I. The Court Should Remand Without Vacating Any of The Challenged Decisions, And It Should Stay The Proceedings For Nine Months.

Maine supports EPA's motion for a voluntary remand. However, Maine argues that the Court should vacate the challenged decisions, especially EPA's decision to approve Maine's designated uses in its water quality standards ("WQS") to include sustenance fishing. As discussed below, the Court should not vacate the challenged decisions. Maine also argues in the alternative, that if the Court does not vacate the challenged decisions, it should retain jurisdiction and set a 120-day timeline for EPA to make a new decision. EPA does not oppose the Court retaining jurisdiction during remand. However, as discussed below, EPA intends to provide an opportunity for public comment on its proposed decisions on remand, and it therefore currently anticipates that it will require nine months to reach final decisions. Maine's proposed four-month period would not be sufficient for EPA to seek and consider public comment on proposed decisions and subsequently to reach final decisions on remand. The Court should therefore remand without vacatur and stay the proceedings for nine months.

A. The Court Should Not Vacate The Challenged Decisions.

After identifying a split among the district courts as to whether a court may vacate an agency decision without first addressing the merits, and noting that the First Circuit has not yet addressed this question, Maine argues that the Court should not reach the merits of the challenged decisions, but that it should vacate those decisions due to the "apparent" problems with the challenged decisions. Maine Mem. at 3-4. Maine also argues that vacatur would avoid alleged disruptive consequences that would flow from keeping the challenged decisions in place, and not cause any harm. *Id.* at 4-7.

EPA agrees that the Court should not reach the merits in deciding the vacatur issue. Given the extensive amount of briefing necessary for the parties to address the merits and the fact that EPA has decided to change the challenged decisions, as opposed to defending them on the merits, it would be impractical and a waste of the parties' and the Court's resources to argue over the merits at this time. Moreover, given the prospect of yet another challenge to any revision EPA might make to its decisions, judicial economy would be best served by assessing the merits once, in that suit. The Court therefore should not require the parties to effectively litigate the merits in order to analyze and decide on Maine's request that the challenged decisions be vacated.

The Court also should decline to vacate EPA's decisions without reaching the merits, as Maine argues. Contrary to Maine's argument, it is not apparent that "serious problems exist with the decisions." Maine Mem. at 6. EPA has not confessed error, nor is it required to do so to obtain a voluntary remand. *Limnia v. DOE*, 857 F.3d 379, 387(D.C. Cir. 2017); *Ohio Valley Envtl. Coal. v. Arocoma Coal Co.,* 556 F.3d 177, 215 (4th Cir. 2009). A finding that the challenged decisions were in error simply because EPA has sought a voluntary remand would be inconsistent with well-settled law that an agency may seek a voluntary remand in order to reevaluate its prior decisions without confessing error. *See, e.g., Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 864 (1984) (an agency must be allowed to assess "the wisdom of its policy on a continuing basis"); *Limnia v. DOE*, 857 F.3d at 387 (an agency is not required to confess error when seeking a voluntary remand).

In addition, EPA has always contended that EPA's disapproval decisions that are challenged here are not even properly before the Court. *See* ECF Doc. 55 at 4-5 (the Court noting, but finding there was no need to then address, EPA's ripeness argument when ruling on EPA's motion to dismiss Count Three of Maine's Second Amended Complaint). The disapproval decisions do not, alone, constitute final agency action and they can only be challenged in the context of a challenge to

EPA's federal replacement WQS consisting of Human Health Criteria ("HHC") for Indian waters in Maine (the "Maine Rule").[1] The Court would need to decide this threshold issue before it could vacate the disapproval decisions. For this reason as well, the Court should not summarily vacate EPA's disapproval decisions as Maine requests.

Maine's only specific contention of error is its assertion that EPA conceded in its motion for voluntary remand that the 2018 clarification letter from the Department of the Interior ("DOI") shows that the challenged decisions were made in error. Maine Mem. at 4. EPA made no such concession in its motion. Rather, EPA simply noted that the 2018 DOI clarification letter is an intervening event that has informed its decision to seek a voluntary remand, and that EPA intends to consider the DOI clarification letter on remand. ECF Doc. 139 ¶ 4. Thus, Maine has not demonstrated any significant problem with the challenged decisions based upon EPA's motion for remand. In addition, even if Maine had shown that such a problem exists, the balance of competing hardships tips strongly in favor of leaving the challenged decisions in place during remand. *See California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) ("A flawed rule need not be vacated."); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (vacatur depends upon "seriousness of the order's deficiencies and the disruptive consequences of an interim change that may itself be changed").

As Maine acknowledges, it has not challenged the Maine Rule, and that EPA decision is not before the Court. EPA currently anticipates that it will take appropriate action with respect to the Maine Rule after it makes its decision on remand with respect to the challenged decisions. In the meantime, the Maine Rule provides protective HHC for Indian waters in Maine.

[1] 81 Fed. Reg. 92,466 (Dec. 19, 2016).

Maine argues that the Maine Rule will remain in effect if the Court vacates the challenged decisions, and Maine acknowledges that the Maine Rule remaining in effect is necessary to redress the harm that would result from vacatur. Maine Mem. at 5. However, the challenged decisions constitute the fundamental underpinnings of the Maine Rule.[2] If the decisions challenged here are vacated, the Maine Rule would be vulnerable (making it an attractive target) if it were challenged in this Court by Maine or another party, including motions to stay pending review under 5 U.S.C. § 705.[3] Thus, vacatur would likely embroil EPA in litigation over the Maine Rule at the very time that EPA needs to expend its limited resources focusing on its decisions on remand. It would also be extremely difficult for EPA to defend such a challenge on the merits (including the likelihood of success on the merits prong of the standard governing stay motions) if the decisions challenged here are vacated. Thus, contrary to Maine's argument, vacatur in this case might encourage a challenge to the Maine Rule, which could lead to vacatur or a stay of the Maine Rule.

On the other hand, the harms that Maine claims from keeping the challenged decisions in place during remand are vague and speculative. Maine argues that leaving the challenged decisions

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[2] As is relevant here, WQS consist of designated uses and criteria to protect those uses. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.3, 131.6, 131.10 and 131.11. In the decisions challenged here, EPA determined that the Settlement Acts (*i.e.*, the Maine Implementing Act, 30 M.R.S. §§ 6201, *et seq.*, the Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (Oct. 10, 1980), the Micmac Settlement Act, 30 M.R.S. §§ 7201, *et seq.*, and the Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 Nov. 26, 1991)), provide for sustenance fishing in Indian waters in Maine; EPA approved that sustenance fishing use in Maine's WQS; and EPA also approved certain provisions of the Maine Implementing Act to be a sustenance fishing designated use for inland reservation waters. EPA disapproved Maine's HHC as insufficiently protective of the sustenance fishing use. In the Maine Rule, EPA promulgated federal HHC to protect the sustenance fishing use in Indian waters. 81 Fed. Reg. 92,466.

[3] Maine does not specifically say that it would not challenge the Maine Rule during remand. In fact, Maine states that it has always anticipated that it will challenge the Maine Rule if it prevails in this case. Maine Mem. at 4. Even if Maine does not challenge the Maine Rule during remand, a discharger might do so, such as the dischargers who, like Maine, previously petitioned EPA to reconsider the challenged decisions and to repeal or withdraw the Maine Rule. *See* ECF No. 93-2 (administrative petition from Baileyville, ME; the Verso Corporation; and Woodland Pulp LLC).

in place will disrupt its management of State waters, notwithstanding its argument that the Maine Rule will remain in effect. *Id.* This is at odds with the Clean Water Act ("CWA") regulatory scheme, under which limitations in discharge permits are established as necessary to meet criteria, such as the HHC established in the Maine Rule, that protect designated uses, such as fishing uses. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). Maine fails to explain how vacating the challenged decisions will restore the status quo if the HHC from the Maine Rule remain in effect.[4]

Maine also argues that confusion and potential litigation would result from leaving the challenged decisions in effect during remand. However, such confusion and litigation would be more likely to occur with vacatur. If the challenged decisions are vacated while the Maine Rule remains in effect, there will likely be confusion during remand with respect to what HHC apply in Indian waters during remand. As discussed above, this confusion, and the fact that the Maine Rule would be vulnerable to a challenge if the decisions at issue here are vacated, would likely lead to additional litigation over the Maine Rule. Thus, on balance, the competing interests favor remand without vacatur, especially given the fact that EPA has no objection to the Court retaining jurisdiction during remand and EPA's intention to take action on remand within nine months.

B. The Court Should Retain Jurisdiction And Stay the Proceedings For Nine Months While EPA Takes Action on Remand.

The Court has the authority to retain jurisdiction during remand when, for example, it wishes to ensure that a voluntary remand will not prejudice the non-movant. *XP Vehicles, Inc. v.*

[4] Maine makes a vague reference to certifications under CWA section 401, 33 U.S.C. § 1341. Maine Mem. at n. 4. Maine fails to explain how any anticipated proposed federal license or permit for which a section 401 certification might be necessary during remand would require the consideration of sustenance fishing in Indian waters separate and apart from consideration of the HHC established to protect sustenance fishing in the Maine Rule. Such vague references of harm are insufficient to counterbalance the likely harm to EPA from vacatur of the challenged decisions.

DOE, 156 F.Supp.3d 185, 193 (D.D.C. 2016), *rev'd on other grounds, Limnia*, 857 F.3d 379. While EPA does not believe that remand without vacatur will prejudice Maine in this case, EPA does not object to Maine's alternative request that the Court retain jurisdiction if it remands without vacatur.

As mentioned above, the four-month remand period proposed by Maine is not sufficient because EPA intends to provide an opportunity for public comment on proposed decisions on remand, and consider any relevant comments it receives before reaching its final decisions. EPA engages in an informal adjudication when it approves or disapproves a State's WQS submission under which it typically does not seek public comment.[5] EPA has decided to exercise its discretion to provide an opportunity for public comment on its proposed decisions on remand in this case.[6] EPA similarly exercised its discretion to seek public comment before making the challenged decisions. This will benefit Maine, the Tribes, the general public, and EPA by providing an opportunity for all to make their views known to EPA, and for EPA to be able to consider those views before it makes final decisions on remand. In the event of any subsequent judicial challenge, this procedure will also benefit the litigants and the Court by providing a more robust record for EPA's decisions on remand than would exist if EPA does not have sufficient time to seek public comment. EPA currently anticipates that it will require four months to draft proposed decisions on remand, it will provide a one-month comment period, and it will require four months to consider

[5] The States are required to hold public hearings when developing new or revised WQS, and the information developed during these hearings is available to EPA when it is considering a State's WQS submission. *See* 33 U.S.C. § 1313(c)(1).

[6] EPA intends to provide notice in one or more newspapers in Maine. It also intends to provide direct notice to certain persons or organizations that have an interest in EPA's decision on remand, such as Maine, the petitioning dischargers, and the Tribes.

any relevant comments it receives and reach final decisions. Therefore, the Court should stay the proceedings for nine months to provide time for EPA's administrative proceedings on remand.[7]

II. The Court Should Reject The Tribes' Unworkable Argument That This Case Should Proceed to The Merits.

The Tribes argue that the Court should deny EPA's motion for a voluntary remand and that the case should proceed to the merits. This case presents an odd circumstance where intervenors on EPA's side attempt to force EPA to defend, and the Court to decide, a challenge to EPA decisions that EPA has decided not to defend, but to reconsider and change.

The Tribes' arguments overlook the fact that EPA has the discretion to reconsider and change the challenged decisions. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (federal agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by reasoned explanation). The Tribes cannot force EPA to defend the challenged decisions, and their contention that the Court should deny EPA's request for a voluntary remand and proceed to the merits is completely unworkable and would result in a waste of the parties' and the Court's resources.[8] If this case were to proceed to the

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[7] EPA has taken no position on the Nation's motion for leave to file a counterclaim against Maine. If the Court allows the Nation to file a counterclaim at this time, EPA respectfully requests that proceedings on the counterclaim be held in abeyance during remand. To the extent that the counterclaim may involve what the Settlement Acts may require with respect to WQS under the CWA, EPA would wish to be heard on those issues. This would detract from the work that EPA will need to undertake on remand and possibly result in EPA needing additional time. In addition, while EPA has decided to change the challenged decisions on remand, it has not yet decided precisely what decisions it will make on remand, and, as discussed above, EPA will seek and consider public comment (including comment from the Nation) before making any such decisions. EPA's decisions on remand may have a bearing on the nature of any issues the Nation may find it necessary to raise. Under all these circumstances, it would be prudent to stay the proceedings on the Nation's counterclaim if the Court allows the counterclaim to be filed at this time.

[8] The Tribes' apparent belief that they can prevent EPA from changing prior EPA decisions approving and disapproving a State's WQS is contrary to Congress's delegation of CWA oversight authority to EPA, and not to the Tribes. 33 U.S.C. §§ 1251(d), 1313(c)(3), 1361(a). To the extent the Tribes believe that they can effectively force EPA to take litigating positions of the Tribe's choosing, this is contrary to Congress' delegation of authority to the Attorney General of the United States to represent EPA in litigation regarding the CWA. *Id.* § 1366; 28 U.S.C. § 516.

merits, Maine would continue to argue that the challenged decisions should be vacated, the Tribes would presumably argue that the challenged decisions should be upheld, and EPA would be forced to revise its decisions through arguments in a legal brief. This would potentially put the Court in the position of determining the wisdom of EPA's policy choices, which is not allowed under the APA's arbitrary and capricious standard of review. *See, e.g., Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997)("[P]olicy choices are for the agency, not the court, to make."). The Court's review would also be based upon an incomplete record because EPA will not have been allowed to consider public comment and explain the basis for its new decisions in an administrative process. The Court should therefore reject the Tribes' arguments and grant EPA's motion for a voluntary remand in the interest of efficient judicial review.

Contrary to the Tribes' proposed chaotic approach, EPA's intended administrative process on remand will provide solid ground for any subsequent judicial review. Any subsequent judicial review of EPA's decisions on remand will have the benefit of EPA's fully articulated rationale made in consideration of Maine's, the Tribes', and the general public's comments.[9] EPA's decisions will be anchored in a new and full administrative record that will provide solid footing for judicial review.

In addition, as the Band points out, there are numerous issues raised in this complex case. Band's Mem. at 8 (noting that Maine has raised over 20 different issues in its 60-page merits brief). Given EPA's plan to change the challenged decisions on remand, it is likely the issues will be narrower in any subsequent litigation. This consideration also supports voluntary remand. *See B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) ("Administrative reconsideration is a more

[9] In addition to the Nation and the Band, the decisions at issue also potentially concern two other federally-recognized Tribes in Maine. EPA's approach will allow for these two non-party Tribes to comment on EPA's proposed decisions on remand.

expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts.") (internal quotation marks and citations omitted).

The Tribes' specific arguments against remand are also not persuasive, especially given that "a remand is usually appropriate" when an agency has decided to reconsider a challenged decision. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)("*SKF*"). *See also Limnia*, 857 F.3d at 379 (an agency may obtain a remand when it states an intention to "reconsider, re-review, or modify the original agency decisions that is the subject of the legal challenge").

The Band cites cases from the District Court for the District of Columbia in an attempt to show that agencies have a heavy burden of showing that some new evidence, intervening event, or some other substantial and legitimate concern supports a remand. Band's Mem. at 3-4 (citing *Bayshore Cmty. Hosp. v. Hargan*, 285 F. Supp.3d. 9, 15 (D.D.C. 2017);[10] *Carpenters Indus. Council v. Salazar*, 734 F. Supp.2d. 126, 132 (D.D.C. 2010)). Contrary to the Band's contention that these district court cases (which do not establish any precedent in any event[11]) set a high bar for voluntary remand motions, the D.C. Circuit has observed that it "commonly grant[s] such [voluntary remand] motions" based upon judicial efficiency concerns. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993).[12]

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[10] The court there initially denied a motion for voluntary remand and then subsequently granted it. *See Bayshore Cmty. Hosp. v. Azar*, ___ F.Supp.3d. ___, 2018 WL 4266083 *2 (D.D.C. Sept. 6, 2018).

[11] *See, e.g., Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)(federal district court decisions do not establish precedent).

[12] The Nation, on the other hand, recognizes that a court may grant a motion for voluntary remand in the absence of an intervening event if the agency has developed doubts about the correctness of its decision or that decision's relationship to the agency's other policies. Nation's Mem. at 5 (citing *Southwestern Bell Tel. Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993)). Thus, while not explicitly saying so, the Nation effectively recognizes that a court may grant a motion for voluntary remand so that an agency can reconsider the wisdom of a previous decision based upon policy concerns, as EPA requests here. *See also SKF*, 254 F.3d at 1029 (an agency may request a voluntary remand in order to reconsider its previous position). In *Southwestern Bell Tel. Co.*, the court noted that it had granted the FCC's motion for a voluntary

The Band argues that the existence of new agency leaders alone does not meet the criteria for granting a motion for voluntary remand. Band's Mem. at 4. However, EPA has not requested a voluntary remand "merely because new political appointees are in place" as the Band asserts. *Id.* at 4. Rather, EPA has noted that new senior EPA leaders have been appointed since EPA previously determined not to change the challenged decisions. While EPA's final decisions on remand will be made with the benefit of a transparent and meaningful public comment process, EPA has now decided to re-examine, at a minimum, the legally complex relationship between the fishing provisions in the Settlement Acts as they relate to Maine's fishing designated use in its WQS, how best to assess tribal fish consumption, and the impact of the 2018 DOI letter. This is a sufficient basis for granting EPA's motion for voluntary remand. *See SKF*, 254 F.3d at 1029. *See also Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency"). Indeed, the Supreme Court has recognized an agency's authority to change its decisions based upon concerns of new agency senior leaders. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)(finding that an agency may consider "varying interpretations and the wisdom of its policy" on a continuing basis, including in response to a change in administrations).[13]

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remand, which was filed after the petitioner had filed its opening brief. 10 F.3d at 896. The court went on to uphold the FCC's decision after remand. *Id.* at 900. Thus, like *Ethyl Corp. v. Browner*, 989 F.2d at 524, the case supports liberally granting voluntary remand motions in order to effectuate efficient judicial review.

[13] The Band relies upon *Jumping Frog Research Inst. v. Babbitt*, 1999 WL 1244149 (N.D. Cal. Dec. 15, 1999), and *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp.2d 130, 136 (D.D.C. 2007), in support of its argument that the appointment of new agency officials does not support remand where the agency has already had sufficient time to review the challenged decisions. In *Jumping Frog*, the court denied voluntary remand, and instead remanded on the merits because the Ninth Circuit had rejected the reasoning underlying the challenged agency decision in another controlling case more than two years before the agency requested a voluntary remand. 1999 WL 1244149 *1-2. No such

The Band also argues that DOI's 2018 letter does not provide a sufficient basis for remand. Band's Mem. at 4-5. The Band's argument actually shows that the 2018 DOI letter supports granting EPA's motion for voluntary remand. As the Band recognizes, the 2018 DOI letter is not in the administrative record for the challenged decisions because it post-dates those decisions. Band's Mem. at 5. Thus, while the 2018 DOI letter contains important clarifications of DOI's 2015 letter, which is in the administrative record, the parties may not properly rely upon it for any merits-based arguments with respect to the challenged decisions, nor may the Court consider it on the merits. As the Band notes, the 2018 letter does vary from DOI's 2015 letter in some respects, including with respect to the Northern Tribes, and it opines upon some aspects of the Wabanaki Traditional Cultural Lifeways Scenario, which is a study that EPA considered in making the challenged decisions. Band's Mem. at 5 and n.3. Thus, the 2018 DOI letter is a consideration in favor of granting EPA's motion for voluntary remand because EPA will be able to consider the letter on remand, the Tribes and Maine will be able to inform EPA of their views of the letter, and all of this information will be properly before the Court in any subsequent challenge to EPA's decisions on remand.[14]

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facts are present here. Unique circumstances were also present in *Assiniboine & Sioux Tribes,* which was a set of consolidated cases concerning accounting and mismanagement claims regarding assets and funds held in trust by the United States on behalf of various tribes. 527 F.Supp.2d at 133. The court denied the request for a voluntary remand and related stay of the proceedings because DOI's accounting had been called into question by the General Accounting Office for over 10 years, and because the court determined that it was necessary to decide underlying merits questions for which DOI had not requested a remand. *Id.* at 135-36. Such considerations are not present here, where, as discussed above, it would be chaotic and a waste of the parties' and the Court's resources to address the underlying merits of decisions EPA has decided to change.

[14] The Band's reliance on *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998), is misplaced. Band's Mem. at 5-6. Unlike the FCC in that case, EPA has not requested remand due to a non-binding policy statement that is directed only towards future agency decisions. *See* 141 F.3d at 349. The 2018 DOI letter clarifies a previous DOI letter that EPA relied upon when making the challenged decisions. It is therefore clearly relevant to the challenged decisions, and EPA will consider the 2018 DOI letter on remand. Moreover, unlike the remand motion in that case,

The Nation argues that EPA's decision to reconsider the challenged decisions is "politically motivated" and that "commentators" recommend against granting motions for voluntary remand when they appear to be motivated by politics. Nation's Mem. at 6-7. Of course, law journal articles, such as the one cited by the Nation, do not establish precedent.[15]

The Nation wrongly argues that EPA's decision to reconsider its prior decisions is "politically motivated" merely because new EPA senior leaders are involved. This argument is contrary to the Supreme Court's explicit recognition that agencies may reconsider the wisdom of their policies in response to a change in administrations, *i.e.*, new senior leadership. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. at 981. The Nation also appears to suggest that EPA's determination must be politically motivated because previous EPA senior leaders in the present administration determined in 2017 not to change the challenged decisions. However, DOI provided its 2018 clarification letter between the two agency reconsideration determinations, and EPA has also had the benefit of Maine's merits brief, which further crystalized the issues. While EPA does not concede any error in the challenged decisions, nor is it required to do so in order to seek a voluntary remand, these intervening documents informed EPA's decision to reconsider the very complex legal, policy, and factual issues presented in this case. Therefore, the Nation's "political motivation" argument should be rejected.[16]

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which the court considered "last-second" because it was made after the court heard oral argument on the merits, EPA filed its remand motion here at the beginning of merits briefing. The D.C. Circuit has granted motions for voluntary remand under similar circumstances. *See Southwestern Bell Tel. Co. v. FCC*, 10 F.3d at 896 (agency's voluntary remand motion granted when it was filed after petitioner had filed its opening brief on the merits).

[15] The article in question was written by a 2017 graduate of Yale Law School.

[16] The Nation incorrectly equates the date that EPA Region I Regional Administrator Alexandra Dunn was appointed as the date she began working at EPA. Nation's Mem. at 7 n.5. She was appointed on November 16, 2017, but she did not begin working at EPA until January 8, 2018. As the Nation notes, EPA Acting Administrator Andrew Wheeler was

In an attempt to convince the Court to reach the merits now, the Nation argues that the central issue in this case is the "scope of EPA's statutory authority (indeed, federal trust obligation) to require Maine to recognize and protect sustenance uses as designated uses of tribal waters under two federal statutes: the Maine Indian Claims Settlement Act and the Clean Water Act." Nation's Mem. at 8. It argues that federal protection of tribal sustenance fishing is not a policy preference that EPA can change. But there are over 20 different issues raised in Maine's 60-page merits brief. *See* Band's Mem. at 8. Thus, this case is far more complex and broader in scope than the Nation makes it out to be, and it is not one in which EPA's discretion is so constrained by statute that there is only one way that EPA can analyze and decide the various issues presented with respect to Maine's WQS.

In addition, at this point, EPA has decided only that it intends to reconsider and change the challenged decisions. EPA has not yet decided exactly how it will change the challenged decisions. The Tribes will have an opportunity to express their views to EPA during the comment period on remand – an opportunity they will not have if EPA is forced to revise the challenged decisions in the course of defending the current challenge. If EPA ultimately issues final decisions on remand that cause a legally-cognizable injury to the Tribes, the Tribes can assert a challenge to such a final agency action under the APA and raise any available arguments regarding EPA's statutory authority and any alleged trust responsibility to the Tribes.[17]

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not confirmed by the Senate to be Deputy Administrator until April 12, 2018, and he was not appointed as Acting Administrator until July 5, 2018. David Ross, the EPA Assistant Administrator for Water, joined EPA in January 2018. Thus, all of these individuals began their current leadership positions with EPA after EPA had initially decided not to change the challenged decisions in December 2017.

[17] Because EPA has not even begun any proceedings on remand, the Nation's assertion that EPA must act in a certain way on Maine's WQS in order to meet an alleged trust responsibility is premature. However, it is important to note that while there is a general trust relationship between the United States and federally-recognized Indian Tribes, that relationship does not impose a duty on the federal government beyond complying with applicable statutes and regulations. "The trust

In the meantime, remand will not harm the Tribes. In fact, all parties appear to agree that the Maine Rule, which established HHC to protect sustenance fishing, should stay in place during remand. As discussed above, this should especially be the case if the Court grants EPA's motion to remand without vacatur, which the Tribes support in the alternative. Thus, the Tribes will not suffer any hardship during remand.

In sum, the Tribes' arguments do not overcome the general rule that an agency may obtain a voluntary remand when it has decided to exercise its discretion to reconsider and change a challenged decision. *See, e.g., SKF*, 254 F.3d at 1029. EPA has done so here, and its motion for voluntary remand should be granted.

CONCLUSION

For all these reasons, as well as those stated in EPA's previous memorandum, the Court should remand EPA's February 2015 decisions to EPA, retain jurisdiction, and hold the proceedings in abeyance for nine months while EPA makes its final decisions on remand.

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obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). Thus, in order to bring a claim for breach of trust, a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014). This "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* Therefore, "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

Respectfully submitted,

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Date: October 12, 2018

CERTIFICATE OF SERVICE

It is hereby certified that all counsel of record who have consented to electronic service are being served with a copy of the foregoing Reply Memorandum in Support of EPA's Motion for a Voluntary Remand on this 12th day of October 2018. Any other counsel of record will be served by first class U.S. mail.

s/David A. Carson